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OFFICE OF

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Michael J. Aguirre
CITY ATTORNEY

May 4, 2007

SUPPLEMENTAL REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

TOBACCO RETAILER ORDINANCE, VERSION D – UPDATED COSTS

References: City Attorney Report to the Honorable Mayor and City Council, dated March 23, 2007, "Tobacco Retailer Ordinance – Version D"

Exhibit A, Tobacco Retailer Ordinance – Version D, dated November 20, 2006

Tobacco Retailer Ordinance, Version D, proposes that a police permit be required for retailers to sell tobacco products. The ordinance states administration will be handled by the Treasurer's Office through the existing Business Tax Certificate process, while investigations and enforcement will be handled by the San Diego Police Department. As proposed, administration and enforcement costs are borne by permittees, through a tobacco retailer permit fee. Version D requests the fee be set at \$156 to allow for full cost recovery.

The San Diego Police Department has recalculated its costs for Fiscal Year 2008. The permit fee must now be set at \$163 to reflect increased costs. Attached is Exhibit B, showing the Department's actual costs for Fiscal Year 2008. Costs will be reviewed annually, and the permit fee adjusted, as necessary, to reflect true costs.

I respectfully request approval of the Tobacco Retailer Ordinance, Version D, and a permit fee of \$163 for Fiscal Year 2008.

Respectfully submitted,



MICHAEL J. AGUIRRE
City Attorney

LLP

Attachment:

Exhibit B, Tobacco Retailer Ordinance – Version D, Cost Recovery Worksheet (May 4, 2007)

TOBACCO RETAILER ORDINANCE – VERSION D

COST RECOVERY WORKSHEET
(Prepared by SDPD / Fiscal Management)

According to the proposed Tobacco Retailer Ordinance, administration and enforcement will be divided between the City Treasurer and the Chief of Police.

Treasurer will:

- (1) Accept applications
- (2) Issue permits / endorse business tax certificates

SDPD will:

- (1) Determine fitness of applicants (background checks)ⁱ
- (2) Investigate violations
- (3) Take administrative action

SDPD recently completed a cost-work up for enforcement of the proposed Tobacco Retailer Ordinance. SDPD made the following assumptions in calculating its costs:

One full-time PCCO (a new position)
 One partial-position Clerical Assistant II
 Pro-Active Enforcement of 6 stings per yearⁱⁱ
 Assuming Overtime
 Assuming 6 PO II Detectives
 Assuming 1 Sergeant Detective
 Averaging 6 hours per sting operation (multiple businesses)
 Plus non-personnel expenses (ongoing and for new position)

\$180,693	SDPD Costs Annually	(\$133 per permit)
\$ 40,000	Treasurer Costs Annually ⁱⁱⁱ	(\$ 30 per permit)
<u>\$220,693</u>	Total Estimated Costs	

$\$220,693 / 1363$ (estimated retail establishments) = \$161.92

Therefore, proposed permit fee (conservative) = \$163

San Diego's proposed permit fee at \$163 is still significantly lower than \$247.50, the average permit fee based on a survey of 16 jurisdictions with similar ordinances (June 2006).

ⁱ SDPD estimates \$55 for background investigative fee.

ⁱⁱ SDPD will conduct six undercover stings per year, targeting multiple businesses, but retains discretion to use its resources as situations warrant and time and resources permit.

ⁱⁱⁱ According to the Manager's Report dated April 7, 2005, that accompanied the previously proposed ordinance, it was stated that the permit would be administered as part of the Business Tax Certificate Process by the City Treasurer. At that time, it was conservatively estimated that \$20K annually would cover costs to process the permits, and \$20K annually would cover the costs of conducting administrative hearings. At that time (April 2005), it was proposed that enforcement would be "folded into" SDPD's current responsibilities. Thus, there were no identified SDPD costs associated with the ordinance. Therefore, the initial \$30 permit fee was calculated assuming annual costs of only \$40K and 1,363 retail establishments ($\$40,000 / 1363 = \29.35).

ORDINANCE NUMBER O-_____ (NEW SERIES)

DATE OF FINAL PASSAGE _____

AN ORDINANCE AMENDING CHAPTER 3, ARTICLE 3, OF
THE SAN DIEGO MUNICIPAL CODE BY ADDING DIVISION
45, SECTIONS 33.4501 TO 33.4519, TITLED "PERMITS FOR
TOBACCO PRODUCT SALES," RELATING TO
REQUIREMENTS FOR PERMITS FOR TOBACCO PRODUCT
SALES

WHEREAS, according to the National Institutes of Health, young people entering high school face social, psychological, and educational challenges, exposing them to various risk factors for drug abuse, including the underage use of legal drugs like tobacco; and

WHEREAS, minors who use tobacco products face profound consequences, including illness, cancer, addiction, increased drug use, poor school performance, and a host of other similar maladies; and

WHEREAS, according to the American Cancer Society, nearly all first use of tobacco products by minors occurs before high school graduation, and if such use is curtailed, then minors are likely to not use tobacco at all; and

WHEREAS, state law (Penal Code section 308) prohibits the sale or furnishing of cigarettes, tobacco products and smoking paraphernalia to minors, as well as the purchase, receipt, or possession of tobacco products to minors; and

WHEREAS, state law requires tobacco retailers to check the identification of tobacco purchasers who reasonably appear to be under 18 years of age (Business and Professions Code

section 22956) and provides procedures for onsite sting inspections of tobacco retailers using persons under 18 years of age (Business and Professions Code section 22952); and

WHEREAS, despite these restrictions, minors continue to obtain cigarettes and other tobacco products at alarming rates; and

WHEREAS, a recent survey by the American Lung Association of San Diego and Imperial Counties carried out in San Diego County showed that as many as 43.9 percent of 244 stores surveyed in the City of San Diego sell cigarettes to minors; and

WHEREAS, the City Council of the City of San Diego has a substantial interest in promoting compliance with state law prohibiting the sale of cigarettes and tobacco products to minors; promoting compliance with federal, state, and local laws intended to discourage the purchase of tobacco products by minors; and in protecting children from being lured into illegal activity through the misconduct of adults; and

WHEREAS, the California Courts in cases such as *Cohen v. Board of Supervisors*, 40 Cal. 3d 277 (1985) and *Bravo Vending v. City of Mirage*, 16 Cal. App. 4th 383 (1993), have affirmed the power of local governments to regulate business activity in order to discourage violations of the law; and

WHEREAS, state law (Health and Safety Code section 11364.7) authorizes revocation of a business license if a person possesses with intent to furnish drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to inject, ingest, inhale, or otherwise introduce into the human body a controlled substance; and

WHEREAS, State Assembly Bill 71, chaptered on October 12, 2003, (Business and Professions Code section 22971.3) created a state licensing program for the sale of tobacco

products and authorizes local governments to adopt their own ordinances to provide for the suspension or revocation of a local license for any violation of a state tobacco control law;

WHEREAS, the City Council of the City of San Diego finds and declares that the purpose of the ordinance is:

- (1) To regulate tobacco retail businesses by requiring police permits; and
- (2) To discourage violations of law which prohibit or discourage the sale or distribution of tobacco products to minors; and
- (3) To protect the health, welfare, and safety of minors; NOW, THEREFORE,

BE IT ORDAINED, by the Council of the City of San Diego, as follows:

Section 1. That Chapter 3, Article 3, of the San Diego Municipal Code be and is hereby amended by adding Division 45, Sections 33.4501 through 33.4519, titled "Permits for Tobacco Product Sales," to read as follows:

§33.4501 Purpose and Intent

It is the purpose and intent of this Division to provide for local regulation of tobacco retail businesses by requiring police permits. The intent is to discourage violations of law prohibiting the sale or distribution of tobacco products to minors to protect their health, welfare, and safety. It is also the intent that all costs associated with the administration and enforcement of this Division be borne by tobacco retailer applicants and permittees.

§33.4502 Definitions

Except as otherwise provided, for purposes of this Division:

"*Person*" has the same meaning as used in Section 11.0210.

"*Police permit*" has the same meaning as used in Municipal Code section 33.0201. For purposes of this Division, the City Treasurer may endorse a business tax certificate with "*Tobacco Retailer Endorsement*" indicating a police permit to operate as a *tobacco retailer* has been issued.

"*Tobacco products*" means any substance containing tobacco leaf, including, but not limited to, cigarettes, pipe tobacco, snuff, chewing tobacco, dipping tobacco, or any other preparation of tobacco.

"*Tobacco retailer*" means any *person* who owns or operates, in whole or in part, a business for profit or not for profit who engages in *tobacco retailing*.

"*Tobacco retailing*" means selling, offering for sale, or offering to exchange for any form of consideration, tobacco, tobacco products or tobacco paraphernalia. [Include "providing free of low cost tobacco products for business purposes" if you want to compel "bar nights" to obtain a permit to give away free samples.]

"*Tobacco retailer endorsement*" shall have the same meaning as "*Police Permit*" except that it may also be issued by the City Treasurer.

§ 33.4503 Police Permit Required for Tobacco Retailer

- (a) It is unlawful for any *person* to operate as a *tobacco retailer* without a *police permit*.
- (b) It is unlawful for any *person* to engage in *tobacco retailing* unless the owner or operator has been issued a *police permit* to operate as a *tobacco retailer* at that location.

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- (c) A *tobacco retailer* must obtain a separate *police permit* for each fixed location from which he or she engages in *tobacco retailing*.
- (d) No *police permit* shall be issued for any *person* operating as a *tobacco retailer* at any location other than a fixed location.
- (e) This section does not apply to sales or exchanges not made to the public.

§33.4504 **Enforcement Authority**

- (a) The administration and enforcement of this Division shall be divided between the *Chief of Police* and the City Treasurer. The *Chief of Police* shall be responsible for determining the fitness of applicants for a *police permit* to operate as a *tobacco retailer*, investigating any violations of this Division, and for taking administrative action against any *police permit* issued under this Division. Subject to approval from the *Chief of Police*, the City Treasurer is responsible for accepting applications for a police permit to operate as a *tobacco retailer*, and for issuing the permit by endorsing the applicant's business tax certificate to indicate that a *police permit* has been issued authorizing the *permittee* to operate a *tobacco retailing* business.
- (b) The City Treasurer may accept an application to operate as a *tobacco retailer* and, subject to approval from the *Chief of Police*, endorse a *tobacco retailer's* business tax certificate with "*Tobacco Retailer Endorsement*," indicating a *police permit* to operate as a *tobacco retailer* has been issued.

- (c) Any information provided to or gathered by the City Treasurer under this Division shall also be shared with and made available to the *Chief of Police*.

§33.4505 Tobacco Retailer Permit Application Contents

- (a) Each applicant for a *police permit* to operate as a *tobacco retailer* shall furnish the following information to the City Treasurer:
- (1) The full true name and any other names ever used by the applicant.
 - (2) The current residential address and telephone number of the applicant.
 - (3) The address of the proposed *tobacco retailer* business location.
 - (4) Each residential address of the applicant for the five years immediately preceding the date of the application, and the inclusive dates of each address.
 - (5) All fictitious business names ever used by applicant and the respective addresses of those businesses.
 - (6) Written proof that the applicant is at least eighteen years of age.
 - (7) A valid social security number.
 - (8) Applicant's height, weight, and color of eyes and hair.
 - (9) Photographs of the applicant as specified by the *Chief of Police*.

- (10) Applicant's business, occupation, and employment history for the five years immediately preceding the date of application, including addresses and dates of employment.
- (11) Whether the applicant has ever had any *license* or *permit* issued by any agency or board, or any city, county, state or federal agency suspended or revoked, or has had any professional or vocational *license* or *permit* suspended or revoked within five years immediately preceding the application, and the reason for the suspension or revocation.
- (12) All criminal *convictions*, including those dismissed pursuant to Penal Code section 1203.4, except traffic infractions, and a statement of the dates and places of such *convictions*.
- (13) The name and address of the current owner and lessor of the real property upon which the proposed *tobacco retailing* business is to be conducted, and a copy of the lease or rental agreement.
- (14) All business tax certificates.
- (15) Information regarding *licenses* required under the "Cigarette and Tobacco Products Licensing Act of 2003," found in Business and Professions Code sections 22970, et seq., including, but not limited to, copies of applications for

licenses, licenses issued, and any documentation regarding the reasons for the denial of such *license*.

- (16) Such other identification and information, including fingerprints, as may be required in order to discover the truth of the matters herein specified as required to be set forth in the application.
- (b) In addition to the information required by Municipal Code section 33.4505(a), an applicant for a *tobacco retailing permit* must furnish the following information to the City Treasurer:
 - (1) If the applicant is a corporation, the name of the corporation exactly as shown in its Articles of Incorporation or Charter, together with the state and date of incorporation, and names and residential addresses of each of its current officers and directors, and of each stockholder holding more than 25 percent of the stock of the corporation;
 - (2) If the applicant is a partnership, the name and residential address of each of the partners, including limited partners;
 - (3) If the applicant is a limited partnership, a copy of the limited partnership's certificate of limited partnership as filed with the County Clerk;

- (4) If one or more of the limited partners is a corporation, the applicant shall provide the information about that partner required by Municipal Code section 33.4505(b)(1);
- (5) If the applicant is a corporation or partnership, the name of the responsible managing officer.

- (6) A copy of the *tobacco retailer's* state tobacco retailer license. [NOTE: This makes sure that the retailer is in compliance with the state licensing law before issuing a local license.]

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- (c) An applicant for a *police permit* to operate as a *tobacco retailer* shall submit a signed declaration certifying that he or she has not been convicted of or faced administrative action based on violations of the offenses listed in Municipal Code section 33.4510. It is unlawful to submit a false, untruthful, or misleading declaration.

§33.4506 Corporate Officers and Partners Deemed Applicants

Each corporate officer or partner of a *tobacco retailing* business is deemed an applicant and each must provide the information required in Municipal Code section 33.4505.

§33.4507 Designation of Responsible Managing Officer, Signature on Applications

An applicant that is a corporation or partnership shall designate one of its officers or general partners to act as its responsible managing officer. The

responsible managing officer may complete and sign all applications on behalf of the corporate officers and partners.

§33.4508 *Proof of State Licenses, Permits, and Certifications Required Before Issuance of Tobacco Retailer Permit*

In addition to the requirements of Municipal Code section 33.4505, any *person* desiring a *police permit* to operate as a *tobacco retailer* shall furnish to the City Treasurer all state *licenses, permits*, and certifications related to the sale of *tobacco products* and alcoholic beverages at the fixed location of the proposed *tobacco retailing* business.

§33.4509 *Investigation Prior to Issuance of Tobacco Retailer Permit*

- (a) The *Chief of Police*, or other designated official, shall make an investigation as may be deemed sufficient as stated in Municipal Code section 33.0301 to determine an applicant's fitness to operate as a *tobacco retailer*. The *Chief of Police* shall have authority to grant or deny a *police permit*, and to determine whether to take administrative action against a *police permit* under this Division.
- (b) An investigation for a permit to operate as a *tobacco retailer* shall be conducted as prescribed in Municipal Code sections 33.0302, 33.0303(a), 33.0304, 33.0306, 33.0307, 33.0308, 33.0309, 33.0310, 33.0311, 33.0312, and 33.0313.

§33.4510 *Grounds for Denial of Tobacco Retailer Permit*

In addition to the grounds for denial stated in Municipal Code section 33.0305(a)-(f), an application for a *police permit* to operate as a *tobacco retailer* shall be denied for any of the following reasons: The applicant has within five years immediately preceding the date of the filing of the application been *convicted* of, suffered any civil penalty, or faced administrative action against any type of *license* for violations of any tobacco control law, including, but not limited to, the following offenses: Penal Code section 308, Business and Professions Code sections 22950, et seq. ("Stop Tobacco Access to Kids Enforcement Act" or the "STAKE Act"), Business and Professions Code sections 22970, et seq. ("Cigarette and Tobacco Products Licensing Act of 2003"), Business and Professions Code sections 17200, et seq. (Unlawful, Unfair or Fraudulent Business Act or Practice) premised on a violation of a tobacco related law, or a charge of violating a lesser-included or lesser-related offense including, but not limited to, Penal Code section 415, in satisfaction of, or as a substitute for, an original charge of any of the offenses listed in this section.

§33.4511 Right to Appeal Denial of Tobacco Retailer Permit

Any applicant denied a permit to operate as a *tobacco retailer* shall be afforded an appeal as prescribed in Municipal Code sections 33.0501, 33.0502, 33.0503, 33.0504, 33.0505, and 33.0508.

§33.4512 Permit Fees

- (a) All costs associated with administration and enforcement of this Division including, but not limited to, investigating *permit*

applications, processing *permit* applications, inspecting, regulating, and enforcing this Division, and providing for appeals, shall be borne by applicants and *permittees*. The City Manager may assess a fee for a *police permit* to operate as a *tobacco retailer* according to the schedule set in the City Clerk's Composite Rate Book.

- (b) A *permit* issued under this Division shall be valid for a period of one year from the date of issuance.

§33.4513 Tobacco Retailer Operating Requirements

- (a) A *tobacco retailer* must keep and post his or her *police permit*, issued under this Division, in the manner prescribed in Municipal Code sections 33.0105(a) and (c). This subsection is regulatory only.
- (b) *Tobacco retailers* shall not allow, at any location for which they have a *police permit* to operate as a *tobacco retailer*, a violation of any tobacco control law including, but not limited to, the offenses listed in Municipal Code section 33.4510. *Tobacco retailers* shall be responsible for the acts of others who violate tobacco control laws at any location for which the *tobacco retailer* possesses a *police permit* to operate as a *tobacco retailer*. This subsection is regulatory only.
- (c) A *tobacco retailer* must display in a conspicuous and prominent location near *tobacco products*, information, in a manner

established by the *Chief of Police*, on how to report violations of tobacco control laws including, but not limited to, reporting sales of *tobacco products* to minors, to the *Chief of Police*.

- (d) A *tobacco retailer* may not provide a venue for smoking or consuming any *tobacco product* anywhere at the permitted location, either indoors or outdoors. [NOTE: This eliminates hookah bars.]

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§33.4514 Penalties and Regulatory Action

- (a) All penalties and regulatory action related to a *police permit* issued to operate as a *tobacco retailer* shall be conducted as prescribed in Municipal Code sections 33.0401 to 33.0406.
- (b) If a *police permit* issued under this Division is suspended or revoked, the *permittee* must post, consistent with section 33.4513(a), written notice of such revocation for the duration of the suspension or revocation with their business tax certificate showing a *tobacco retailer* endorsement.

§33.4515 Additional Penalties

Pursuant to Health and Safety Code section 11364.7, a business license may be revoked if a *person* possesses with intent to furnish drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to inject, ingest, inhale, or otherwise introduce into the human body a controlled substance.

§33.4515 Civil Suit

(a) Notwithstanding any other provision of this Division or this Code,

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the City Attorney or City Prosecutor [NOTE: define these in definitions section?] may seek a civil injunction to enforce this Division or to prohibit a violation of a *police permit* or may bring a civil suit under Business and Professions Code sections 17200, et seq. (unlawful, unfair or fraudulent business act or practice) for a violation of this Division or a violation of a *police permit*. If the City Attorney or City Prosecutor prevails, in addition to any other remedies ordered by the court, any *police permit* at issue shall be suspended for a minimum of: ten days for a first suspension in five years; 30 days for a second suspension in five years; 120 days for a third suspension in five years; and five years for a fourth suspension in five years. The City Attorney and City Prosecutor shall recoup any expenditure made to enforce this Division from the permit fee proceeds and the permit fee shall be calculated to include such reimbursements. [NOTE: This gives the city attorney an express role in enforcement, to back up any strong talk to the retailers.]

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(b) Any violation of this Division or of a *police permit* is hereby declared to be a public nuisance. [NOTE: This adds another enforcement possibility: civil suit for nuisance abatement.]

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[NOTE: I feel strongly that if the city knows the police will not have

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the manpower to enforce compliance with the permit requirements,
alternative enforcement mechanisms should be included.]

§33.4516 Tobacco Retailer Permit Not Transferable

A police permit issued under this Division is not transferable.

§33.4517 Grandfather Clause

Convictions for offenses listed in Section 33.4510 shall not be used to deny an application for a police permit under this Division if the date of the conviction was prior to the passage of this Division.

§33.4518 Reporting

The Chief of Police shall, on a yearly basis or as requested by the Public Safety and Neighborhood Services Committee, report to the Public Safety and Neighborhood Services Committee the following information:

- (a) *A summary of activity related to the administration and enforcement of this Division; and*
- (b) *An accounting of all funds received and used for the administration and enforcement of this Division; and*
- (c) *The estimated rate of illegal sales of tobacco products to minors within the City of San Diego.*

§33.4519 Sunset Clause

This Division shall be repealed five years from and after the final passage of this Division, unless this section is repealed.

Section 2. That a full reading of this ordinance is dispensed with prior to its final passage, a written or printed copy having been available to the City Council and the public a day prior to its final passage.

Section 3. This ordinance shall take effect and be in force on the one hundred and eightieth day from and after its final passage.

APPROVED: MICHAEL J. AGUIRRE, City Attorney

By _____
Linda L. Peter
Deputy City Attorney

LLP
06/27/06
Or.Dept:Police
O-2006-161

I hereby certify that the foregoing Ordinance was passed by the Council of the City of San Diego, at this meeting of _____.

ELIZABETH S. MALAND
City Clerk

By _____
Deputy City Clerk

Approved: _____

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OFFICE OF

THE CITY ATTORNEY
CITY OF SAN DIEGO

Michael J. Aguirre
CITY ATTORNEY

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June 29, 2006

REPORT TO THE COMMITTEE ON PUBLIC
SAFETY AND NEIGHBORHOOD SERVICES

TOBACCO RETAILER ORDINANCE

References: Manager's Report to the Committee on Public Safety and Neighborhood Services, dated April 7, 2005, "Proposed Police Permit for Tobacco Sales in San Diego," report number 05-091, with attachments

City Attorney Report to the Committee on Public Safety and Neighborhood Services, dated April 7, 2005, "Tobacco Ordinance," with attachments

City Attorney Supplemental Report to the Committee on Public Safety and Neighborhood Services, dated April 8, 2005, "Proposed Tobacco Retailer Ordinance," with attached Draft Ordinance "Version B"

REQUESTED ACTION

APPROVE PROPOSED TOBACCO RETAILER ORDINANCE VERSION C--AN ORDINANCE AMENDING CHAPTER 3, ARTICLE 3, OF THE SAN DIEGO MUNICIPAL CODE BY ADDING DIVISION 45, SECTIONS 33.4501 TO 33.4519, TITLED "PERMITS FOR TOBACCO PRODUCT SALES," RELATING TO REQUIREMENTS FOR PERMITS FOR TOBACCO PRODUCT SALES

INTRODUCTION

The sale of tobacco products to minors is a public health and safety concern. In 2004, the American Lung Association of San Diego and Imperial Counties conducted a purchase survey of 264 stores in the City of San Diego. The survey found that 43.6 % of the stores sold cigarettes to minors who attempted to make a purchase. Current state laws prohibit the sale of tobacco products to minors (Penal Code section 308), require retailers to check the identification of tobacco purchasers who appear to be under the age of 18 (Business and Professions Code section 22956), and authorize onsite sting inspections of tobacco retailers using persons under the age of 18 (Business and Professions Code section 22952). Nonetheless, the state legislature felt more could be done.

In 2003, the California Cigarette and Tobacco Products Licensing Act (AB 71) was passed, establishing a state-wide licensing requirement for the sale of tobacco products. AB 71, codified in Business and Professions Code section 22971.3, also authorized local jurisdictions to enact their own tobacco control laws. That statute states, "Nothing in this division preempts or supersedes any local tobacco control law other than those related to the collection of state taxes. Local licensing laws may provide for the suspension or revocation of the local license for any violation of a state tobacco control law."

In response to AB 71, in 2004, the Public Safety and Neighborhood Services Committee ["the Committee"] met to discuss a proposed local ordinance. The local ordinance would require all tobacco retailers in the City of San Diego to possess a police permit for the sale of tobacco products. The intent of the ordinance was to discourage the sale of tobacco products to minors to protect their health, welfare, and safety. A violator of the ordinance would risk suspension or revocation of his or her tobacco retailer permit.

The American Lung Association found that tobacco retail licensing ordinances, when coupled with enforcement, is an effective tool. In March 2006, communities throughout the state reported dramatic decreases in tobacco sales to minors after enacting their ordinances. For example, in Berkeley, rates dropped from 38 percent to 14 percent; in Contra Costa County, rates dropped from 37 percent to 7 percent; in Pasadena, rates dropped from 19 percent to 5 percent; in the City of Sacramento, rates dropped from 27 percent to 7 percent; and in the City of San Luis Obispo, rates dropped from 17 percent to 2 percent.

In April 2005, the Committee was presented with two versions of a proposed Tobacco Retailer Ordinance (O-2005-65-DRAFT and O-2005-65-DRAFT-Version B). The proposed ordinances were the result of numerous meetings with various stakeholders, including members of the community, law enforcement, health advocates, and local retailers. The draft ordinances were identical except that Version B included language for mandatory inspections of tobacco retail establishments. Version B added a subdivision (c) to Section 33.4512 and stated, "To insure [sic] compliance with this Division, the Chief of Police shall be required to inspect at least 20 percent of tobacco retailers per year." Neither ordinance received enough support from the Committee to advance it to the City Council.

DISCUSSION

The City Attorney believes it is important to have a local ordinance that complements and supplements existing state laws. The City Attorney's Office is proposing a revised version of the ordinance, designated Draft C. Draft C reflects the original proposed draft ordinance of last year in that it does not require mandatory police inspections of tobacco retail establishments. Similarly, it is intended that permit fees will cover all costs associated with administration and enforcement of the ordinance. However, the previously proposed permit fee of \$30 is now insufficient because the city can no longer rely on tobacco settlement funds to offset costs associated with this ordinance. It is currently estimated that a permit fee of \$100 is reasonable and realistic, and is still well below the average annual permit fee of \$247.50, based on 16 jurisdictions that have similar ordinances.

Finally, Draft C specifically includes by incorporation state law authorizing the suspension or revocation of a police permit if a retailer also sells drug paraphernalia. Section 33.4515 of proposed ordinance Draft C states, "Pursuant to Health and Safety Code section 11364.7, a business license may be revoked if a person possesses with intent to furnish drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to inject, ingest, inhale, or otherwise introduce into the human body a controlled substance."

CONCLUSION

Attached is proposed ordinance Draft C for your consideration. The City Attorney's Office recognizes it cannot satisfy the needs of all stakeholders. However, the ordinance is a step in the right direction given the need to do something rather than maintain the status quo.

Respectfully submitted,


MICHAEL J. AGUIRRE
City Attorney

LLP
Attachments



6401 Linda Vista Road, Annex A, San Diego, CA 92111 (858) 268-8077* Fax (858) 268-8017* phoebe@sdcoe.k12.ca.us

Ninth District PTA
supports the adoption of the Tobacco-Free Communities Model Ordinance
by the cities of San Diego County.

Recognizing that elected officials have a responsibility for the health and welfare of their citizens, Ninth District PTA encourages civic leaders to take action that would prevent the use of tobacco among young people, and reduce children's exposure to secondhand smoke. This action could include

- **Licensing retailers to sell tobacco**
- Restricting the location and density of tobacco sources (through land use controls)
- Ban on tobacco self-service sales at retail locations
- Prohibiting smoking in outdoor areas such as beaches and parks, restaurant patios, building entrances, and family-friendly outdoor venues

Tobacco use is the single most preventable cause of death today. Smoking causes 430,000 deaths a year for smokers, and secondhand smoke causes 50,000 deaths a year for non smokers. Everyday, 3000 kids start smoking. Ninety percent of adult smokers began before they were 18, and had legal access to tobacco.

Tobacco litter covers our beaches, parks, and public places, 50% of all litter on our beaches is tobacco related. Tobacco litter is washed into our ocean waters where it does not biodegrade, and where it harms marine life. Cigarette butts are handled and ingested by young children, a hazardous behavior.

Children and youth observe smoking and tobacco use in beaches, parks, and other public venues, and may model this behavior. The quality of a healthy and pleasant outside activity for adults and children is compromised by smoking in public places. Asthma is the Number 1 reason that children enter the hospital emergency rooms in San Diego County. Only 16% of the adult population in California smokes, holding hostage the 84% that do not.

Also, illegal drug use is rare among young people that have never smoked. According to the National Household Survey on Drug Abuse, youth between the ages of 12 and 17 years old who had smoked in the past 30 days were 3 times more likely to have consumed alcohol, 8 times more likely to have smoked marijuana and 22 times more likely to have used cocaine than those who had not had not smoked cigarettes.

Our city officials are in a unique position to create policies that will influence the availability of tobacco to teens through retail sources, and that will affect how young people see and experience tobacco use. We at Ninth District PTA support the adoption of the Tobacco-Free Communities Model Ordinance.

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HARM

Health Advocates Rejecting Marijuana

The goal of HARM is to decrease the accessibility of marijuana and accessibility/availability of marijuana-related paraphernalia and to minimize messages that encourage, normalize or trivialize marijuana use.

Mailing Address: PO Box 2448, Del Mar, CA 92014 Fax: (858) 755-6598 Email: HARM.SD.MPI@gmail.com

Facilitator: Judi Strang,
San Dieguito Alliance

Policy Co-Chair: Rebecca Hernandez,
SWACC (Safety Wellness Advocacy
Community Coalition)

Policy Co-Chair: Lisa Silverman,
Social Advocates for Youth

Media Co-Chair: Dannah Hosford,
North Inland Community Prevention
Program

Media Co-Chair: Victoria Carlborg,
Tri-City Prevention
Collaborative/Vista Community Clinic

HARM Membership:
Balboa Park Collaborative

Californians for Drug Free Youth

Coronado SAFE Foundation

County of San Diego, MHSA
Alcohol and Drug Services

East County Collaborative Project

El Cajon CASA

Institute for Public Strategies

Mid City CAN

National Marijuana Initiative

Ninth District PTA

North City Prevention Coalition

North Inland Community

Prevention Program

Palavra Tree

Phoenix House

Safety Wellness Advocacy
Community Coalition

San Dieguito Alliance
for Drug Free Youth

San Diego County Office Education /
Friday Night Live

San Diego County Youth
Leadership Project

San Diego Prevention Coalition

South Bay Partnership

Telesis

Tri-City Prevention Collaborative/
Vista Community Clinic

US Drug Enforcement Administration

Vitality San Diego

City Council, City of San Diego
202 'C' Street, San Diego, CA 92101

10 September 2007

Dear City council members,

HARM (Health Advocates Rejecting Marijuana), a county wide prevention initiative, thanks you for this opportunity to share our concerns regarding the proliferating of headshops in the city of San Diego.

The HARM Initiative was formed in San Diego County in 2004 to address the problem of youth marijuana use. In San Diego County:

- More teens smoke marijuana than cigarettes;
- Marijuana use is the number one reason youth enter treatment;
- 90% of all marijuana use begins before age 18, 10% before the age of 12.

The goal of HARM is to reduce marijuana use by youth, to lessen the problems associated with the accessibility and use of marijuana by youth, and to change the perception that marijuana is harmless.

Over the last year, the community based organizations involved with HARM have been contacted by numerous members of the community concerning headshops in their neighborhoods where youth and others can purchase drug paraphernalia. Sometimes these establishments are near schools and other youth frequented areas.

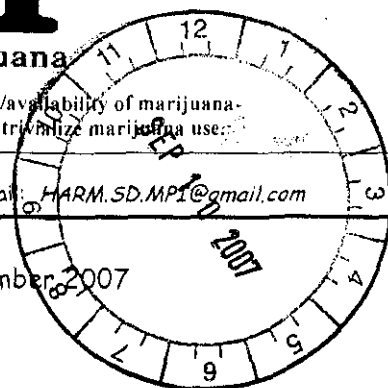
The number of headshops in San Diego county is 93, 48 of which are in the city of San Diego.

On the reverse side of this letter is a list of the headshops in the City of San Diego. Of special note are the headshops that are **bolded and blue**; they are the new headshops within the last 16 months. **San Diego has 22 new headshops since April of 2006.** This proliferation of headshops in San Diego is alarming.

HARM and its member prevention agencies support the tobacco retailers licensure ordinance presented to city council today as a good first step in addressing the serious problem of retailers selling drug paraphernalia.

With regard,

Judi Strang, Faciliator for HARM
judistrang@earthlink.net 858.382.6598 cell



San Diego Headshops - 'T' indicates the headshops that sell tobacco also

NAME	000537	ADDRESS	CITY	ZIP	% Paraphernalia	Tobacco
BEACH AREAS						
Highland Smoke Shop		4799 Voltaire St	San Diego	92107	95	T
The Black		5017 Newport Ave	San Diego	92107	30	T
Vishions		5038 Newport Ave	San Diego	92107	90/50	T
Crossroads Smokeshop		972 Garnet	San Diego	92109	20	T
Godfather		1138 Garnet Ave	San Diego	92109	50/90	T
The Funky Monkey		1346 Garnet	San Diego	92109	90	O
PB Smokeshop		1449 Garnet	San Diego	92109	70	T
Da Glassworks		1438 Garnet Ave	San Diego	92109	90	O
High Road		1463 Garnet Ave	San Diego	92109	50/90	T
Gypsy Corner/Love Boutiques and Smoke Shop		1570 Garnet	San Diego	92109	65	O
420 Smokeshop		1753 Garnet Ave	San Diego	92109	99	O
Smokeshop		705 Turquoise St	San Diego	92109	80	T
Illusions		841 Turquoise	San Diego	92109		
Get It On Shoppe		3219 Mission Blvd	San Diego	92109	99	T
Freak Factory		3742 Mission Blvd	San Diego	92109	75	T
Saco's Smoke Shop		3837 W Mission Bay Drive	San Diego	92109	50	T
Vishions		3148 Midway Dr	San Diego	92110	75	T
Midway Cigar Lounge Smoke		3555 Rosecrans #105B	San Diego	92110	30	T
Smoke N Stuff		2372 Barnett	San Diego	92110	90	T
CITY AREA						
ABC Smokeshop		4101 Market	San Diego	92102	assessed	
Inhale		805 F Street	San Diego	92101	95	T
Inhale		410 University Avenue	San Diego	92103	60	T
Puff N Stuff		3837 Park Blvd	San Diego	92103	75	O
Universal Smoke Shop		550 University Ave	San Diego	92103	60	T
Franky's		4506 30th Street	San Diego	92104	60/ 75	T
Up in Smoke		2516 University Avenue	San Diego	92104	95	O
Reggae World		2540 University Avenue	San Diego	92104		
420 Smoke Shop		2551 University Ave	San Diego	92104	60	O
Puffs and Snuffs		2849 University	San Diego	92104	50	O
Smokers Choice/Discount Cigarettes		3018 University Avenue	San Diego	92104	20	T
Smoke for Less		4640 University Avenue	San Diego	92105	10	T
USA Depot Discount Tobacco Shop		4726 University Ave	San Diego	92105	40	T
Smoke N Stuff		2372 Barnett	San Diego	92110	90	T
Illusions		5525 Clairemont Mesa	San Diego	92111	35	T
Aztec Smokeshop		5969 El Cajon Blvd	San Diego	92115	70	T
The High Road		6166 El Cajon Blvd.	San Diego	92115	90	T
Puff N Stuff		6663 El Cajon Blvd	San Diego	92115	80/90	T
Glass Act		6737 El Cajon Blvd	San Diego	92115	95	O
Smoke and Save 420 Smokeshop		6957 El Cajon Blvd	San Diego	92115		
Up in Smoke		7200A El Cajon Blvd	San Diego	92115		
Woody's		3214 Adams Avenue	San Diego	92115	90	T
U Save Smokeshop & Cellular		3452 Adams Avenue	San Diego	92115	25/40	T
Smoke and Go		6519 University Ave	San Diego	92115	75/99	T
Eddies Cigarettes Cheaper		5065A Clairemont Dr	San Diego	92117	15	T
Smoker's Outlet		3093 Clairemont Dr	San Diego	92117	15	T
Smoke N Stuff		5945 Mission Gorge Rd #2	San Diego	92120	80	O
Up in Smoke		6904 Miramar Road #209	San Diego	92121	95	O
Cigarettes Depot		Sandrock Road	San Diego	92123	30	T

Blue headshops new since April 2006

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July 12, 2006



The Honorable Brian Maienschein, Chair
Public Safety and Neighborhood Services Committee
City of San Diego, 202 C Street, 12th Floor
San Diego, CA 92101

Your Family In The Industry

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PRESIDENT/CEO

Auday Arabo, Esq.

Dear Chairman Maienschein and Honorable Committee Members:

On behalf of the California Independent Grocers and Convenience Stores (IGCS), the largest not-profit independent grocers trade association in the State of California, we must respectfully oppose the proposed tobacco permitting ordinance, which would create yet another licensing scheme and additionally unnecessary annual fees for retailers.

Illegal sales of tobacco products to minors is a very serious concern and that is why our association was the only association in the entire state to support legislation (AB 71) creating a state run tobacco licensing scheme. AB 71 became law on January 1, 2004 and has been enforcing its provisions through the State Board of Equalization. Some retailers have already received 30-day suspension of their state tobacco license because of AB 71, which provides for tobacco licensing and fines and penalties in order to stop the illegal sales of tobacco products by some unscrupulous so-called businesses.

The State of California already licenses all tobacco retailers via AB 71 in a more than adequate manner and the penalty structure that currently exists for those who sell tobacco to minors is in place and is effective. This bill also required all tobacco retailers to pay a \$100 fee for the tobacco license.

IGCS has endorsed many of our members actively participate in the WeCard program (a nationally recognized anti-youth program) and strongly advocate for full adherence to the STAKE Act, which provides civil penalties of up to \$6,000 to anyone found to have sold tobacco products to a minor. Tobacco licensing should be left to the state and we should not overburden the San Diego Police Department with another task and duplicate state efforts.

When you consider all the law that are already on the books governing tobacco sales to minors, from the criminal realm, Penal Code 308 which is a misdemeanor, to the Stake Act to AB 71, it is clear that a local ordinance which further licenses and penalizing all retailers is duplicative, unwarranted and further burdens the hundreds of legitimate businesses who abide by the law. Furthermore, we should not unnecessarily burden our local law enforcement with another task considering our budget shortfall.

We respectfully request that you oppose any proposed local tobacco licensing ordinance. We ask that you allow the recently passed state law (AB 71) to run its course and spare small business from yet another illegitimate "tax."

Thank you for your time and attention to this request. We gladly welcome the opportunity to answer any questions you may have on this issue. For the reasons stated above, California IGCS respectfully opposes the proposed tobacco ordinance.

Sincerely,
Auday P. Arabo, Esq.
President & CEO



STOP Tobacco access To Kids ENFORCEMENT ACT

Summary Of Tobacco Laws Controlling Tobacco Sales And Distribution To Minors

SALES TO MINORS

Penal Code Section 308 (Added in 1891; last amended in 1990)

- It is unlawful to knowingly sell, give, or in any way furnish cigarettes or tobacco products to persons under 18 years of age. In the case of vending machines, the person who authorizes the installation or placement of a tobacco vending machine is liable for any sale to a minor.
- Each offense is subject to either criminal action as a misdemeanor or to civil action, punishable by a fine of \$200 for the first offense, \$500 for the second offense, and \$1,000 for the third offense.
- A minor who purchases or receives any tobacco products may be punished by a fine of \$50 or 25 hours of community service.
- Businesses that sell tobacco products must keep a copy of Penal Code § 308 conspicuously posted. The Secretary of State provides copies of Penal Code § 308 upon request.
- Any business that fails to post Penal Code § 308 shall, upon conviction, be punished by a fine of \$10 for the first violation and \$50 for each succeeding violation, or by imprisonment of no more than 30 days.
- A city or county may not adopt an ordinance or regulation inconsistent with this section.

SINGLE CIGARETTES

Penal Code Section 308.2 (Added in 1991)

- It is illegal to sell one or more cigarettes separately. Cigarettes must be sold in the manufacturer's package, sealed and properly labeled, according to federal requirements.

STOP TOBACCO ACCESS TO KIDS ENFORCEMENT (STAKE) ACT

Business and Professions Code Sections 22950-22960 (Added in 1994; amended in 1995)

- The STAKE Act:
 1. Prohibits the sale or provision of tobacco products to persons under 18 years of age;
 2. Requires the California Department of Health Services to enforce laws prohibiting the sale, distribution, or provision of tobacco products to persons under 18 years of age;
 3. Requires retail sellers to check the identification of anyone attempting to buy tobacco who appears to be under 18 years of age;
 4. Requires retailers of tobacco products to post a warning sign at each point of sale and on each vending machine, stating that selling tobacco products to minors is illegal and subject to penalties. Warning signs must include a toll-free telephone number (1-800-5 ASK-4-KID) that customers may use to report observed tobacco sales to youth under the age of 18;

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5. Requires any tobacco product distributor or wholesaler and any vending machine operator to annually provide the California Department of Health Services the names and addresses of the tobacco product retailers that they supply and the name and address for each location where cigarette vending machines are placed; and
 6. As of January 1, 1996, prohibits the sale of tobacco products from all vending machines except in businesses holding an on-sale public premise liquor license. This includes places such as barrooms, taverns, saloons and cocktail lounges. Vending machines must be located at least 15 feet from these entrances.
- Investigators from the California Department of Health Services, Food and Drug Branch will conduct on-site compliance checks with the assistance of minors 15-16 years of age who will be granted immunity from prosecution.
 - The owner of a business where tobacco is sold or provided to a minor is subject to civil penalties of \$200 to \$300 for the first violation; \$600 to \$900 for the second violation; \$1,200 to \$1,800 for the third violation; \$3,000 to \$4,000 for the fourth violation; and \$5,000 to \$6,000 for a fifth or subsequent violation within a five-year period.

TOBACCO ADVERTISING AND PROMOTION

Business and Professions Code Section 17537.3 (Added in 1986)

It is unlawful to:

1. Promote offers of smokeless tobacco products that require proof of smokeless tobacco products purchase, unless the offer indicates it is not available to minors and requires the purchaser to verify being 18 years of age or older;
2. Promote offers of smokeless tobacco products by mail or telephone unless appropriate efforts are made to determine that the purchaser is over 18 years of age, e.g., requesting purchaser's birth date;
3. Distribute free samples of smokeless tobacco products within a two block radius of facilities serving persons under 18 years of age, such as schools, clubhouses, and youth centers; and
4. Mail unsolicited samples of smokeless tobacco products.

TOBACCO SAMPLING

Health and Safety Code-Section 25967 (Added in 1991)

- It is unlawful to give smokeless tobacco or cigarettes, or coupons or rebate offers for smokeless tobacco or cigarettes, at no cost or at nominal cost to the general public in a public place.
- Violators incur a civil penalty of \$200 for the first violation; \$500 for the second violation; and \$1,000 for three or more violations.
- Exemptions are as follows:
 1. Public areas where persons under 18 years of age are prohibited;
 2. Public areas leased for private functions where access is denied to persons under 18 years of age by a peace officer or licensed security guard; and
 3. Distribution of tobacco products or coupon rebate offers in connection with the sale of another item including tobacco products, cigarette lighters, magazines, or newspapers.
- Cities and counties may enact stronger sampling ordinances.

From: 000541 John Rivera
To: Lori Witzel
Date: 7/12/2006 11:46:14 AM
Subject: Fwd: Tobacco Retail Licensing Ordinance Update

Hi Lori,

Could you provide this to Councilmembers with note this just came in. Thx-j

>>> "Molly Bowman" <mbowman@lungsandiego.org> 7/12/2006 11:19 AM >>>
 Hi, John!

I look forward to attending this afternoon's committee hearing, and testifying on behalf of the San Diego Tobacco-Free Communities Coalition's Model Ordinance Workgroup.

While we support the initiative to revisit tobacco retail licensing as a policy solution to prevent the sale of tobacco products to children, our workgroup would support the ordinance if it includes of a definitive schedule of penalties, including permit suspension. Based on our policy discussions with the Technical Assistance Legal Center (TALC), a legal clearinghouse, funded by the California Department of Health Services, to provide California communities with free technical assistance on tobacco control policy issues, we believe our concerns could be addressed by inserting a stipulation in the ordinance that explicitly would empower the City Attorney to seek a civil injunction to enforce a violation of the ordinance, or bring a civil suit under the Business and Professions Code sections 17200. Should the City attorney prevail, the penalty schedule would apply to offending retailers (ten days for a first suspension in five years; 30 days for a second suspension in five years; 120 days for a third suspension in five years; and five years for a fourth suspension in five years.)

Our workgroup members also request the incorporation of several other policies into the final version of the tobacco retail licensing ordinance. We outlined our policy recommendations in a letter to the City Attorney, which you will find in the attachment.

I've also included TALC's suggested revisions to the ordinance. You may access a matrix comparing strong local tobacco retailer licensing laws in California by visiting The Center for Tobacco Policy & Organizing's website: <http://www.californialung.org/thecenter/>. The matrix is located under "Local Hot Topics," in the lower right hand corner of the website.

Thank you so much for your consideration, John. Please don't hesitate to

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contact me should you have any questions. I look forward to seeing you this afternoon!

Warmest Regards,

Molly

Molly Bowman-Styles

Policy Manager

American Lung Association

2750 Fourth Avenue

San Diego, CA 92103

619-297-3901

mbowman@lungsandiego.org

July 6, 2006

The Honorable Mike Aguirre
City Attorney
City of San Diego
1200 Third Avenue, #1620
San Diego, CA 92101

Dear Mr. Aguirre:

Thank you so much for taking the initiative to revisit tobacco retail licensing as a policy solution to prevent the sale of tobacco products to youth. Your commitment to protecting children from illegal tobacco sales – and a potential life-time addiction to nicotine – is commendable. We are pleased to have the opportunity to work with you, Councilmember Young, and other council members on this vital effort.

The American Lung Association and our partners in the Tobacco-Free Communities Coalition have been working closely with elected officials to reduce the alarming rates of illegal tobacco sales to youth in communities across San Diego County. We share your belief that the city of San Diego's 43.6 percent illegal sales rate of tobacco to children is unacceptable.

Research in California has shown that effective local tobacco retail licensing laws are the best way to hold accountable unscrupulous retailers who sell tobacco products to minors. On behalf of the thirty agency members of Tobacco-Free Communities Coalition, our Model Ordinance Workgroup has analyzed the proposed ordinance, and its findings are presented in this letter.

Position of Tobacco-Free Communities Coalition

The next meeting of the coalition will be July 20, so it has not been possible to adopt a position in time for the July 12th meeting of the PS & NS Committee. However, the Model Ordinance Workgroup recommends the following position:

Ordinance Strengths

The Center for Tobacco Policy & Organizing has been funded by the state of California to identify which components in tobacco retail licensing policies contribute the most to reducing illegal sales. We applaud the proposed ordinance for including two of the four components recommended by the Center:

- *Requirements that all retailers who sell tobacco products must obtain a license and renew it annually.*
- *Coordination of tobacco regulations so that a violation of any existing local, state or federal regulation violates the license.*

Our Workgroup members also appreciate the inclusion of provisions that will further discourage violations of tobacco control laws and reduce problems associated with drug paraphernalia:

- Banning mobile tobacco sales
- Extensive background checks of potential tobacco retailers
- Requiring the conspicuous display of information about how to report violations of tobacco control laws to the Chief of Police
- The revocation of a business license if a person possesses the intent to furnish drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to inject, ingest, inhale, or otherwise introduce into the human body a controlled substance
- Requiring an annual summary report, to the Public Safety and Neighborhood Services Committee, of activity related to the administration and enforcement of the ordinance; and accounting of all funds received and used for the administration and enforcement of the ordinance; and the estimated rate of illegal sales of tobacco products to minors within the City of San Diego

Ordinance Weaknesses

In its current form, the ordinance does not include the following two policy components that the Center has identified:

- *A fee set high enough to sufficiently fund an effective program, including administration of the program and enforcement efforts. An enforcement plan, that includes compliance checks, should be clearly stated.*

The Model Ordinance Work Group understands the fiscal constraints and staffing shortages experienced by the San Diego Police Department. Although we are pleased that the proposed \$30 annual tobacco retailer permit fee has been increased to \$100, we would appreciate receiving a summary of how the revenue generated by the fee would be allocated between administration and enforcement. In addition, since the Police Chief is afforded exclusive responsibility for the enforcement provisions set forth in the draft ordinance, the Workgroup would like to understand the specific role the city attorney will play in discouraging the sale of tobacco to minors.

- *A financial deterrent, through fines and penalties, including the suspension and revocation of the license. Fines and penalties should be outlined in the ordinance.*

Municipal Code Article 3, Division 4, spells out the criminal penalties and regulatory actions that may be taken against violators of the proposed ordinance. Lacking a defined penalty structure, these actions are left to the sole

discretion of the Police Chief. In order to provide certainty to the level of enforcement discipline, Model Ordinance Workgroup members request the incorporation of the City of Vista or City of El Cajon's Suspension/Revocation Schedule into the draft ordinance. (Please refer to pages 5 and 8 of *Strong Local Tobacco Retail Licenses in California: A Comparison*.)

Additionally, the ordinance could stipulate the prerogative of the City Attorney to seek a civil injunction to enforce the ordinance, or to prohibit a violation of a police permit, or may bring a civil suit under Business and Professions Code sections 17200, et seq. – Unlawful, Unfair or Fraudulent Business Act or Practice. (Please see page 14 of *Technical Assistance Legal Center's (TALC) suggested revision to draft ordinance*.)

The Model Ordinance Workgroup also recommends the inclusion of the following provisions:

- Require that clerks be the minimum legal age to purchase tobacco products (currently 18 years old)
- Require retailers to check the age of purchasers who “reasonably appear” to be under the age of 27
- Require that all tobacco-related products and paraphernalia be removed from public view during periods of suspension and revocation
- Prohibit tobacco retailers from providing a venue for smoking or consuming any tobacco product anywhere at the permitted location, either outdoors or indoors. (This would help control the growing menace of hookah lounges)
- Provide for alternative enforcement mechanisms, such as empowering Neighborhood Code Compliance officers to conduct store inspections and cite offending tobacco retailers

Conclusions

Although we recognize the commendable provisions set forth in the proposed ordinance, the Model Ordinance Workgroup cannot support it without the incorporation of a definitive schedule of penalties, including permit suspension and revocation. Based on our discussions with Technical Assistance Legal Center (TALC), a legal clearinghouse, funded by the California Department of Health Services, to provide California Communities with free technical assistance on tobacco control policy issues, we believe our concerns could be addressed by adding the following language to the draft ordinance:

§33.4515 Civil Suit

- (a) Notwithstanding any other provision of this Division or this Code, the City Attorney or City Prosecutor [NOTE: define these in definitions section?] may seek a civil injunction to

enforce this Division or to prohibit a violation of a *police permit* or may bring a civil suit under Business and Professions Code sections 17200, et seq. (unlawful, unfair or fraudulent business act or practice) for a violation of this Division or a violation of a *police permit*. If the City Attorney or City Prosecutor prevails, in addition to any other remedies ordered by the court, any *police permit* at issue shall be suspended for a minimum of: ten days for a first suspension in five years; 30 days for a second suspension in five years; 120 days for a third suspension in five years; and five years for a fourth suspension in five years. The City Attorney and City Prosecutor shall recoup any expenditure made to enforce this Division from the permit fee proceeds and the permit fee shall be calculated to include such reimbursements. [NOTE: This gives the city attorney an express role in enforcement, to back up any strong talk to the retailers.]

- (b) Any violation of this Division or of a *police permit* is hereby declared to be a public nuisance. [NOTE: This adds another enforcement possibility: civil suit for nuisance abatement.]

The Technical Assistance Legal Center's (TALC) suggested revisions to the ordinance, and The Center for Tobacco Policy & Organizing comparison of strong local tobacco retailer licensing laws in California, are enclosed for your reference.

Thank you so much for your consideration, Mr. Aguirre. We are confident you will appreciate our efforts to establish an effective tobacco retail licensing law in the City of San Diego that will protect children, from illegal tobacco sales, for years to come.

Please don't hesitate to contact us should you have any questions.

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Warm Regards,

Debra Kelley
V.P. of Government Relations

Molly Bowman-Styles
Policy Manager

Attachments:

Strong Local Tobacco Retailer Licensing Laws in California, The Center for Tobacco Policy & Organizing

Suggested Revision to Draft Tobacco Retail Licensing Ordinance, Technical Assistance Legal Center (TALC)

ORDINANCE NUMBER O-_____ (NEW SERIES)

DATE OF FINAL PASSAGE _____

AN ORDINANCE AMENDING CHAPTER 3, ARTICLE 3, OF
THE SAN DIEGO MUNICIPAL CODE BY ADDING DIVISION
45, SECTIONS 33.4501 TO 33.4519, TITLED "PERMITS FOR
TOBACCO PRODUCT SALES," RELATING TO
REQUIREMENTS FOR PERMITS FOR TOBACCO PRODUCT
SALES

WHEREAS, according to the National Institutes of Health, young people entering high school face social, psychological, and educational challenges, exposing them to various risk factors for drug abuse, including the underage use of legal drugs like tobacco; and

WHEREAS, minors who use tobacco products face profound consequences, including illness, cancer, addiction, increased drug use, poor school performance, and a host of other similar maladies; and

WHEREAS, according to the American Cancer Society, nearly all first use of tobacco products by minors occurs before high school graduation, and if such use is curtailed, then minors are likely to not use tobacco at all; and

WHEREAS, state law (Penal Code section 308) prohibits the sale or furnishing of cigarettes, tobacco products and smoking paraphernalia to minors, as well as the purchase, receipt, or possession of tobacco products to minors; and

WHEREAS, state law requires tobacco retailers to check the identification of tobacco purchasers who reasonably appear to be under 18 years of age (Business and Professions Code

section 22956) and provides procedures for onsite sting inspections of tobacco retailers using persons under 18 years of age (Business and Professions Code section 22952); and

WHEREAS, despite these restrictions, minors continue to obtain cigarettes and other tobacco products at alarming rates; and

WHEREAS, a 2004 purchase survey by the American Lung Association of San Diego and Imperial Counties showed that 43.6 percent of 264 stores surveyed in the City of San Diego sell cigarettes to minors; and

WHEREAS, the City Council of the City of San Diego has a substantial interest in promoting compliance with state law prohibiting the sale of cigarettes and tobacco products to minors; promoting compliance with federal, state, and local laws intended to discourage the purchase of tobacco products by minors; and in protecting children from being lured into illegal activity through the misconduct of adults; and

WHEREAS, the California Courts in cases such as *Cohen v. Board of Supervisors*, 40 Cal. 3d 277 (1985) and *Bravo Vending v. City of Mirage*, 16 Cal. App. 4th 383 (1993), have affirmed the power of local governments to regulate business activity in order to discourage violations of the law; and

WHEREAS, state law (Health and Safety Code section 11364.7) authorizes revocation of a business license if a person possesses with intent to furnish drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to inject, ingest, inhale, or otherwise introduce into the human body a controlled substance; and

WHEREAS, State Assembly Bill 71, chaptered on October 12, 2003, (Business and Professions Code section 22971.3) created a state licensing program for the sale of tobacco

products and authorizes local governments to adopt their own ordinances to provide for the suspension or revocation of a local license for any violation of a state tobacco control law;

WHEREAS, the City Council of the City of San Diego finds and declares that the purpose of the ordinance is:

- (1) To regulate tobacco retail businesses by requiring police permits; and
- (2) To discourage violations of law which prohibit or discourage the sale or distribution of tobacco products to minors; and
- (3) To protect the health, welfare, and safety of minors; NOW, THEREFORE,

BE IT ORDAINED, by the Council of the City of San Diego, as follows:

Section 1. That Chapter 3, Article 3, of the San Diego Municipal Code be and is hereby amended by adding Division 45, Sections 33.4501 through 33.4519, titled "Permits for Tobacco Product Sales," to read as follows:

§33.4501 Purpose and Intent

It is the purpose and intent of this Division to provide for local regulation of tobacco retail businesses by requiring police permits. The intent is to discourage violations of law prohibiting the sale or distribution of tobacco products to minors to protect their health, welfare, and safety. It is also the intent that all costs associated with the administration and enforcement of this Division be borne by tobacco retailer applicants and permittees.

§33.4502 Definitions

Except as otherwise provided, for purposes of this Division:

"Person" has the same meaning as used in Section 11.0210.

"*Police permit*" has the same meaning as used in Municipal Code section 33.0201. For purposes of this Division, the City Treasurer may endorse a business tax certificate with "*Tobacco Retailer Endorsement*" indicating a police permit to operate as a *tobacco retailer* has been issued.

"*Tobacco products*" means any substance containing tobacco leaf, including, but not limited to, cigarettes, pipe tobacco, snuff, chewing tobacco, dipping tobacco, or any other preparation of tobacco.

"*Tobacco retailer*" means any *person* who owns or operates, in whole or in part, a business for profit or not for profit who engages in *tobacco retailing*.

"*Tobacco retailing*" means selling, offering for sale, or offering to exchange for any form of consideration, tobacco, tobacco products or tobacco paraphernalia.

"*Tobacco retailer endorsement*" shall have the same meaning as "*Police Permit*" except that it may also be issued by the City Treasurer.

§ 33.4503 Police Permit Required for Tobacco Retailer

- (a) It is unlawful for any *person* to operate as a *tobacco retailer* without a *police permit*.
- (b) It is unlawful for any *person* to engage in *tobacco retailing* unless the owner or operator has been issued a *police permit* to operate as a *tobacco retailer* at that location.
- (c) A *tobacco retailer* must obtain a separate *police permit* for each fixed location from which he or she engages in *tobacco retailing*.

- (d) No *police permit* shall be issued for any *person* operating as a *tobacco retailer* at any location other than a fixed location.
- (e) This section does not apply to sales or exchanges not made to the public.

§33.4504 Enforcement Authority

- (a) The administration and enforcement of this Division shall be divided between the *Chief of Police* and the City Treasurer. The *Chief of Police* shall be responsible for determining the fitness of applicants for a *police permit* to operate as a *tobacco retailer*, investigating any violations of this Division, and for taking administrative action against any *police permit* issued under this Division. Subject to approval from the *Chief of Police*, the City Treasurer is responsible for accepting applications for a police permit to operate as a *tobacco retailer*, and for issuing the permit by endorsing the applicant's business tax certificate to indicate that a *police permit* has been issued authorizing the *permittee* to operate a *tobacco retailing* business.
- (b) The City Treasurer may accept an application to operate as a *tobacco retailer* and, subject to approval from the *Chief of Police*, endorse a *tobacco retailer's* business tax certificate with "*Tobacco Retailer Endorsement*," indicating a *police permit* to operate as a *tobacco retailer* has been issued.

- (c) Any information provided to or gathered by the City Treasurer under this Division shall also be shared with and made available to the *Chief of Police*.

§33.4505 Tobacco Retailer Permit Application Contents

- (a) Each applicant for a *police permit* to operate as a *tobacco retailer* shall furnish the following information to the City Treasurer:
- (1) The full true name and any other names ever used by the applicant.
 - (2) The current residential address and telephone number of the applicant.
 - (3) The address of the proposed *tobacco retailer* business location.
 - (4) Each residential address of the applicant for the five years immediately preceding the date of the application, and the inclusive dates of each address.
 - (5) All fictitious business names ever used by applicant and the respective addresses of those businesses.
 - (6) Written proof that the applicant is at least eighteen years of age.
 - (7) A valid social security number.
 - (8) Applicant's height, weight, and color of eyes and hair.
 - (9) Photographs of the applicant as specified by the *Chief of Police*.

- (10) Applicant's business, occupation, and employment history for the five years immediately preceding the date of application, including addresses and dates of employment.
- (11) Whether the applicant has ever had any *license* or *permit* issued by any agency or board, or any city, county, state or federal agency suspended or revoked, or has had any professional or vocational *license* or *permit* suspended or revoked within five years immediately preceding the application, and the reason for the suspension or revocation.
- (12) All criminal *convictions*, including those dismissed pursuant to Penal Code section 1203.4, except traffic infractions, and a statement of the dates and places of such *convictions*.
- (13) The name and address of the current owner and lessor of the real property upon which the proposed *tobacco retailing* business is to be conducted, and a copy of the lease or rental agreement.
- (14) All business tax certificates.
- (15) Information regarding *licenses* required under the "Cigarette and Tobacco Products Licensing Act of 2003," found in Business and Professions Code sections 22970, et seq., including, but not limited to, copies of applications for

licenses, licenses issued, and any documentation regarding the reasons for the denial of such *license*.

- (16) Such other identification and information, including fingerprints, as may be required in order to discover the truth of the matters herein specified as required to be set forth in the application.

- (b) In addition to the information required by Municipal Code section 33.4505(a), an applicant for a *tobacco retailing permit* must furnish the following information to the City Treasurer:

- (1) If the applicant is a corporation, the name of the corporation exactly as shown in its Articles of Incorporation or Charter, together with the state and date of incorporation, and names and residential addresses of each of its current officers and directors, and of each stockholder holding more than 25 percent of the stock of the corporation;
- (2) If the applicant is a partnership, the name and residential address of each of the partners, including limited partners;
- (3) If the applicant is a limited partnership, a copy of the limited partnership's certificate of limited partnership as filed with the County Clerk;

- (4) If one or more of the limited partners is a corporation, the applicant shall provide the information about that partner required by Municipal Code section 33.4505(b)(1);
 - (5) If the applicant is a corporation or partnership, the name of the responsible managing officer.
- (c) An applicant for a *police permit* to operate as a *tobacco retailer* shall submit a signed declaration certifying that he or she has not been convicted of or faced administrative action based on violations of the offenses listed in Municipal Code section 33.4510. It is unlawful to submit a false, untruthful, or misleading declaration.

§33.4506 Corporate Officers and Partners Deemed Applicants

Each corporate officer or partner of a *tobacco retailing* business is deemed an applicant and each must provide the information required in Municipal Code section 33.4505.

§33.4507 Designation of Responsible Managing Officer, Signature on Applications

An applicant that is a corporation or partnership shall designate one of its officers or general partners to act as its responsible managing officer. The responsible managing officer may complete and sign all applications on behalf of the corporate officers and partners.

§33.4508 Proof of State Licenses, Permits, and Certifications Required Before Issuance of Tobacco Retailer Permit

In addition to the requirements of Municipal Code section 33.4505, any *person* desiring a *police permit* to operate as a *tobacco retailer* shall furnish to the City Treasurer all state *licenses, permits*, and certifications related to the sale of *tobacco products* and alcoholic beverages at the fixed location of the proposed *tobacco retailing* business.

§33.4509 Investigation Prior to Issuance of Tobacco Retailer Permit

- (a) The *Chief of Police*, or other designated official, shall make an investigation as may be deemed sufficient as stated in Municipal Code section 33.0301 to determine an applicant's fitness to operate as a *tobacco retailer*. The *Chief of Police* shall have authority to grant or deny a *police permit*, and to determine whether to take administrative action against a *police permit* under this Division.
- (b) An investigation for a permit to operate as a *tobacco retailer* shall be conducted as prescribed in Municipal Code sections 33.0302, 33.0303(a), 33.0304, 33.0306, 33.0307, 33.0308, 33.0309, 33.0310, 33.0311, 33.0312, and 33.0313.

§33.4510 Grounds for Denial of Tobacco Retailer Permit

In addition to the grounds for denial stated in Municipal Code section 33.0305(a)-(f), an application for a *police permit* to operate as a *tobacco retailer* shall be denied for any of the following reasons: The applicant has within five years immediately preceding the date of the filing of the application been *convicted of*, suffered any civil penalty, or faced

administrative action against any type of *license* for violations of any tobacco control law, including, but not limited to, the following offenses: Penal Code section 308, Business and Professions Code sections 22950, et seq. ("Stop Tobacco Access to Kids Enforcement Act" or the "STAKE Act"), Business and Professions Code sections 22970, et seq. ("Cigarette and Tobacco Products Licensing Act of 2003"), or a charge of violating a lesser-included or lesser-related offense including, but not limited to, Penal Code section 415, in satisfaction of, or as a substitute for, an original charge of any of the offenses listed in this section.

§33.4511 Right to Appeal Denial of Tobacco Retailer Permit

Any applicant denied a permit to operate as a *tobacco retailer* shall be afforded an appeal as prescribed in Municipal Code sections 33.0501, 33.0502, 33.0503, 33.0504, 33.0505, and 33.0508.

§33.4512 Permit Fees

- (a) All costs associated with administration and enforcement of this Division including, but not limited to, investigating *permit* applications, processing *permit* applications, inspecting, regulating, and enforcing this Division, and providing for appeals, shall be borne by applicants and *permittees*. The City Manager may assess a fee for a *police permit* to operate as a *tobacco retailer* according to the schedule set in the City Clerk's Composite Rate Book.
- (b) A *permit* issued under this Division shall be valid for a period of one year from the date of issuance.

Tobacco Retailer Operating Requirements

- (a) A *tobacco retailer* must keep and post his or her *police permit*, issued under this Division, in the manner prescribed in Municipal Code sections 33.0105(a) and (c). This subsection is regulatory only.
- (b) *Tobacco retailers* shall not allow, at any location for which they have a *police permit* to operate as a *tobacco retailer*, a violation of any tobacco control law including, but not limited to, the offenses listed in Municipal Code section 33.4510. *Tobacco retailers* shall be responsible for the acts of others who violate tobacco control laws at any location for which the *tobacco retailer* possesses a *police permit* to operate as a *tobacco retailer*. This subsection is regulatory only.
- (c) A *tobacco retailer* must display in a conspicuous and prominent location near *tobacco products*, information, in a manner established by the *Chief of Police*, on how to report violations of tobacco control laws including, but not limited to, reporting sales of *tobacco products* to minors, to the *Chief of Police*.

Penalties and Regulatory Action

- (a) All penalties and regulatory action related to a *police permit* issued to operate as a *tobacco retailer* shall be conducted as prescribed in Municipal Code sections 33.0401 to 33.0406.

- (b) If a *police permit* issued under this Division is suspended or revoked, the *permittee* must post, consistent with section 33.4513(a), written notice of such revocation for the duration of the suspension or revocation with their business tax certificate showing a *tobacco retailer* endorsement.

§33.4515 Additional Penalties

Pursuant to Health and Safety Code section 11364.7, a business license may be revoked if a *person* possesses with intent to furnish drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to inject, ingest, inhale, or otherwise introduce into the human body a controlled substance.

§33.4516 Tobacco Retailer Permit Not Transferable

A *police permit* issued under this Division is not transferable.

§33.4517 Grandfather Clause

Convictions for offenses listed in Section 33.4510 shall not be used to deny an application for a *police permit* under this Division if the date of the *conviction* was prior to the passage of this Division.

§33.4518 Reporting

The *Chief of Police* shall, on a yearly basis or as requested by the Public Safety and Neighborhood Services Committee, report to the Public Safety and Neighborhood Services Committee the following information:

- (a) A summary of activity related to the administration and enforcement of this Division; and

- (b) An accounting of all funds received and used for the administration and enforcement of this Division; and
- (c) The estimated rate of illegal sales of *tobacco products* to minors within the City of San Diego.

§33.4519 Sunset Clause

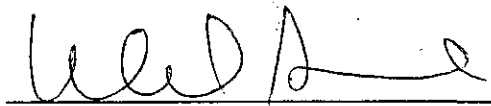
This Division shall be repealed five years from and after the final passage of this Division, unless this section is repealed.

Section 2. That a full reading of this ordinance is dispensed with prior to its final passage, a written or printed copy having been available to the City Council and the public a day prior to its final passage.

Section 3. This ordinance shall take effect and be in force on the one hundred and eightieth day from and after its final passage.

APPROVED: MICHAEL J. AGUIRRE, City Attorney

By


Michael J. Aguirre
City Attorney

RECEIVED
07 AUG 30 PM 3:05
CITY CLERK'S OFFICE
SAN DIEGO, CA

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06/27/06
Or.Dept:Police
O-2006-161

000563 REQUEST FOR COUNCIL ACTION CITY OF SAN DIEGO		1. CERTIFICATE NUMBER (FOR AUDITOR'S USE) N/A 50 10/16																																																				
TO: CITY ATTORNEY	2. FROM (ORIGINATING DEPARTMENT): City Attorney	3. DATE: March 23, 2007																																																				
4. SUBJECT: Tobacco Retailer Ordinance – Version D																																																						
5. PRIMARY CONTACT (NAME, PHONE, & MAIL STA.) Linda Peter, 533-6292, MS 59	6. SECONDARY CONTACT (NAME, PHONE, & MAIL STA.) Anna Lonergan, 533-5838, MS 59	7. CHECK BOX IF REPORT TO COUNCIL IS ATTACHED <input checked="" type="checkbox"/>																																																				
8. COMPLETE FOR ACCOUNTING PURPOSES																																																						
FUND DEPT. ORGANIZATION OBJECT ACCOUNT JOB ORDER C.I.P. NUMBER AMOUNT	9. ADDITIONAL INFORMATION / ESTIMATED COST: An Ordinance amending the SDMC by adding a section relating to requirements for a police permit for tobacco product sales. Permit fee allows for full cost recovery. See attached Report to Council for details.																																																					
10. ROUTING AND APPROVALS																																																						
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An Ordinance amending the San Diego Municipal Code by adding Sections 33.4501 to 33.4518, titled "Permits for Tobacco Products Sales," relating to requirements for a police permit for tobacco product sales. Permit fee allows for cost recovery of administration and enforcement costs associated with the Ordinance.																																																						
11A. STAFF RECOMMENDATIONS: Adopt the Ordinance.																																																						
12. SPECIAL CONDITIONS (REFER TO A.R. 3.20 FOR INFORMATION ON COMPLETING THIS SECTION.)																																																						
<u>COUNCIL DISTRICT(S):</u> ALL DISTRICTS.																																																						
<u>COMMUNITY AREA(S):</u> COMMUNITIES CITY WIDE.																																																						
<u>ENVIRONMENTAL IMPACT:</u> THIS ACTIVITY IS NOT A PROJECT AND, THEREFORE, IS EXEMPT FROM CEQA PURSUANT TO STATE CEQA GUIDELINES, SECTION 15060 (c) (3).																																																						
<u>HOUSING IMPACT:</u> N/A																																																						
<u>OTHER ISSUES:</u> N/A																																																						

EXECUTIVE SUMMARY SHEET

00 565

DATE ISSUED: March 23, 2007

REPORT NO.:

ATTENTION:

SUBJECT: Tobacco Retailer Ordinance – Version D

REFERENCE:

REQUESTED ACTION: Adopt the Ordinance amending the San Diego Municipal Code by adding Sections 33.4501 to 33.4518, titled “Permits for Tobacco Products Sales,” relating to requirements for police permits for tobacco product sales.

STAFF RECOMMENDATION: Adopt the Ordinance.

SUMMARY: Tobacco use by minors is a public health and safety risk. State laws are insufficient to address tobacco use by minors, and state law authorizes local governments to adopt their own ordinances to provide for the suspension or revocation of a local license for any violation of a state tobacco control law. The proposed ordinance provides for local regulation of tobacco retail businesses by requiring police permits. The proposed ordinance will discourage violations of law which prohibit or discourage the sale or distribution of tobacco products to minors.

FISCAL CONSIDERATIONS: A proposed permit fee of \$163 allows for full cost recovery of administration and enforcement costs related to this ordinance in the first year. Costs will be reviewed annually, and the permit fee will be adjusted, as necessary, to reflect true costs. Costs will be included in the Police Department’s fiscal year appropriation.

PREVIOUS COUNCIL and/or COMMITTEE ACTION: In April 2005, the Committee on Public Safety and Neighborhood Services was presented with two versions of a Tobacco Retailer Ordinance, 0-2005-65-DRAFT and O-2005-65-DRAFT-Version B. Neither version passed Committee. In July 2006, Version C was presented to the Committee. Version C received enough votes to move forward without recommendation, pending resolution and clarification of several issues. Those issues are addressed in Version D.

COMMUNITY PARTICIPATION AND PUBLIC OUTREACH EFFORTS: American Lung Association; California Grocers Association; San Diego small business owners

KEY STAKEHOLDERS & PROJECTED IMPACTS (if applicable): Local retailers will be required to obtain police permits to sell tobacco products.

City Attorney’s Office

Michael J. Aguirre

Originating Department

City Attorney

ORDINANCE NUMBER O-_____ (NEW SERIES)

DATE OF FINAL PASSAGE _____

AN ORDINANCE AMENDING CHAPTER 3, ARTICLE 3, OF
THE SAN DIEGO MUNICIPAL CODE BY ADDING DIVISION
45, SECTIONS 33.4501 TO 33.4518, TITLED "PERMITS FOR
TOBACCO PRODUCT SALES," RELATING TO
REQUIREMENTS FOR PERMITS FOR TOBACCO PRODUCT
SALES

WHEREAS, according to the National Institutes of Health, minors face social, psychological, and educational challenges, exposing them to various risk factors for drug abuse, including the underage use of legal drugs like tobacco; and

WHEREAS, minors who use tobacco products face profound consequences, including illness, cancer, addiction, increased drug use, poor school performance, and a host of other similar maladies; and

WHEREAS, according to the American Cancer Society, nearly all first use of tobacco products by minors occurs before high school graduation, and if such use is curtailed, then minors are likely to not use tobacco at all; and

WHEREAS, state law (Penal Code section 308) prohibits the sale or furnishing of cigarettes, tobacco products and smoking paraphernalia to minors, as well as the purchase, receipt, or possession of tobacco products to minors; and

WHEREAS, state law requires tobacco retailers to check the identification of tobacco purchasers who reasonably appear to be under 18 years of age (Business and Professions Code

section 22956) and provides procedures for onsite sting inspections of tobacco retailers using persons under 18 years of age (Business and Professions Code section 22952); and

WHEREAS, despite these restrictions, minors continue to obtain cigarettes and other tobacco products at alarming rates; and

WHEREAS, a 2004 purchase survey by the American Lung Association of San Diego and Imperial Counties showed that 43.6 percent of 264 stores surveyed in the City of San Diego sell cigarettes to minors; and

WHEREAS, the City Council of the City of San Diego has a substantial interest in promoting compliance with state law prohibiting the sale of cigarettes and tobacco products to minors; promoting compliance with federal, state, and local laws intended to discourage the purchase of tobacco products by minors; and in protecting children from being lured into illegal activity through the misconduct of adults; and

WHEREAS, the California courts in cases such as *Cohen v. Board of Supervisors*, 40 Cal. 3d 277 (1985) and *Bravo Vending v. City of Mirage*, 16 Cal. App. 4th 383 (1993), have affirmed the power of local governments to regulate business activity in order to discourage violations of the law; and

WHEREAS, state law (Health and Safety Code section 11364.7) authorizes revocation of a business license if a person possesses with intent to furnish drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to inject, ingest, inhale, or otherwise introduce into the human body a controlled substance; and

WHEREAS, State Assembly Bill 71, chaptered on October 12, 2003, (Business and Professions Code section 22971.3) created a state licensing program for the sale of tobacco

products and authorizes local governments to adopt their own ordinances to provide for the suspension or revocation of a local license for any violation of a state tobacco control law;

WHEREAS, the City Council of the City of San Diego finds and declares that the purpose of the ordinance is:

- (1) To regulate tobacco retail businesses by requiring police permits; and
- (2) To discourage violations of law which prohibit or discourage the sale or distribution of tobacco products to minors; and
- (3) To protect the health, welfare, and safety of minors; NOW, THEREFORE,

BE IT ORDAINED, by the Council of the City of San Diego, as follows:

Section 1. That Chapter 3, Article 3, of the San Diego Municipal Code be and is hereby amended by adding Division 45, Sections 33.4501 through 33.4518, titled "Permits for Tobacco Product Sales," to read as follows:

§33.4501 Purpose and Intent

It is the purpose and intent of this Division to provide for local regulation of tobacco retail businesses by requiring police permits. The intent is to discourage violations of law prohibiting the sale or distribution of tobacco products to minors to protect their health, welfare, and safety. It is also the intent that all costs associated with the administration and enforcement of this Division be borne by tobacco retailer applicants and permittees. It is further the intent that recoveries hereunder shall be used to pay the costs of enforcement of this Division.

§33.4502 Definitions

Except as otherwise provided, for purposes of this Division:

“*Person*” has the same meaning as used in Section 11.0210.

“*Police permit*” has the same meaning as used in Municipal Code section 33.0201. For purposes of this Division, the City Treasurer may endorse a business tax certificate with “*Tobacco Retailer Endorsement*” indicating a *police permit* to operate as a *tobacco retailer* has been issued.

“*Tobacco products*” means any substance containing tobacco leaf, including, but not limited to, cigarettes, pipe tobacco, snuff, chewing tobacco, dipping tobacco, or any other preparation of tobacco.

“*Tobacco retailer*” means any *person* who owns or operates, in whole or in part, a business for profit or not for profit who engages in *tobacco retailing*.

“*Tobacco retailing*” means selling, offering for sale, or offering to exchange for any form of consideration, tobacco, *tobacco products* or tobacco paraphernalia.

“*Tobacco retailer endorsement*” shall have the same meaning as “*Police Permit*” except that it may also be issued by the City Treasurer.

§ 33.4503 Police Permit Required for Tobacco Retailer

- (a) It is unlawful for any *person* to operate as a *tobacco retailer* without a *police permit*.
- (b) It is unlawful for any *person* to engage in *tobacco retailing* unless the owner or operator has been issued a *police permit* to operate as a *tobacco retailer* at that location.

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- (c) A *tobacco retailer* shall obtain a separate *police permit* for each fixed location from which he or she engages in *tobacco retailing*.
- (d) No *police permit* shall be issued for any *person* operating as a *tobacco retailer* at any location other than a fixed location.
- (e) This section does not apply to sales or exchanges not made to the public.

§33.4504 Enforcement Authority

- (a) The administration and enforcement of this Division shall be divided between the City Treasurer and the *Chief of Police*.

Subject to approval from the *Chief of Police*, the City Treasurer shall be responsible for accepting applications for a *police permit* to operate as a *tobacco retailer*, and for issuing the permit by endorsing the applicant's business tax certificate to indicate that a *police permit* has been issued authorizing the *permittee* to operate a *tobacco retailing* business. The *Chief of Police* shall be responsible for determining the fitness of applicants for a *police permit* to operate as a *tobacco retailer*, investigating any violations of this Division, and for taking administrative action against any *police permit* issued under this Division.
- (b) The City Treasurer shall accept an application to operate as a *tobacco retailer* and, subject to approval from the *Chief of Police*, endorse a *tobacco retailer's* business tax certificate with "*Tobacco Retailer Endorsement*," indicating a *police permit* to operate as a *tobacco retailer* has been issued.

- (c) Any information provided to or gathered by the City Treasurer under this Division shall also be shared with and made available to the *Chief of Police*.

§33.4505 Tobacco Retailer Permit Application Contents

- (a) Each applicant for a *police permit* to operate as a *tobacco retailer* shall furnish the following information to the City Treasurer:
- (1) The full true name and any other names ever used by the applicant.
 - (2) The current residential address and telephone number of the applicant.
 - (3) The address of the proposed *tobacco retailer* business location.
 - (4) Each residential address of the applicant for the five years immediately preceding the date of the application, and the inclusive dates of each address.
 - (5) All fictitious business names ever used by applicant and the respective addresses of those businesses.
 - (6) Written proof that the applicant is at least eighteen years of age.
 - (7) A valid social security number.
 - (8) Applicant's height, weight, and color of eyes and hair.
 - (9) Photographs of the applicant as specified by the *Chief of Police*.

- (10) Applicant's business, occupation, and employment history for the five years immediately preceding the date of application, including addresses and dates of employment.
- (11) Whether the applicant has ever had any *license* or *permit* issued by any agency or board, or any city, county, state or federal agency suspended or revoked, or has had any professional or vocational *license* or *permit* suspended or revoked within five years immediately preceding the application, and the reason for the suspension or revocation.
- (12) All criminal *convictions*, including those dismissed pursuant to Penal Code section 1203.4, except traffic infractions, and a statement of the dates and places of such *convictions*.
- (13) The name and address of the current owner and lessor of the real property upon which the proposed *tobacco retailing* business is to be conducted, and a copy of the lease or rental agreement.
- (14) All business tax certificates.
- (15) Information regarding *licenses* required under the "Cigarette and Tobacco Products Licensing Act of 2003," found in Business and Professions Code sections 22970, et seq., including, but not limited to, copies of applications for

licenses, licenses issued, and any documentation regarding the reasons for the denial of such *license*.

- (16) Such other identification and information, including fingerprints, as may be required in order to discover the truth of the matters herein specified as required to be set forth in the application.

- (b) In addition to the information required by Municipal Code section 33.4505(a), an applicant for a *tobacco retailing permit* shall furnish the following information to the City Treasurer:

- (1) If the applicant is a corporation, the name of the corporation exactly as shown in its Articles of Incorporation or Charter, together with the state and date of incorporation, and names and residential addresses of each of its current officers and directors, and of each stockholder holding more than 25 percent of the stock of the corporation;
- (2) If the applicant is a partnership, the name and residential address of each of the partners, *including* limited partners;
- (3) If the applicant is a limited partnership, a copy of the *limited partnership's certificate of limited partnership* as filed with the County Clerk;

- (4) If one or more of the limited partners is a corporation, the applicant shall provide the information about that partner required by Municipal Code section 33.4505(b)(1);
- (5) If the applicant is a corporation or partnership, the name of the responsible managing officer.
- (c) An applicant for a *police permit* to operate as a *tobacco retailer* shall submit a signed declaration certifying that he or she has not been convicted of or faced administrative action based on violations of the offenses listed in Municipal Code section 33.4510.

§33.4506 Corporate Officers and Partners Deemed Applicants

Each corporate officer or partner of a *tobacco retailing* business is deemed an applicant and each shall provide the information required in Municipal Code section 33.4505.

§33.4507 Designation of Responsible Managing Officer, Signature on Applications

An applicant that is a corporation or partnership shall designate one of its officers or general partners to act as its responsible managing officer. The responsible managing officer may complete and sign all applications on behalf of the corporate officers and partners.

§33.4508 Proof of State Licenses, Permits, and Certifications Required Before Issuance of Tobacco Retailer Permit

In addition to the requirements of Municipal Code section 33.4505, any *person* desiring a *police permit* to operate as a *tobacco retailer* shall furnish to the City Treasurer copies of all state *licenses, permits*, and certifications related to the sale of *tobacco products* and alcoholic beverages at the fixed location of the proposed *tobacco retailing* business.

§33.4509 Investigation Prior to Issuance of Tobacco Retailer Permit

- (a) The *Chief of Police*, or other designated official, shall make an investigation as may be deemed sufficient as stated in Municipal Code section 33.0301 to determine an applicant's fitness to operate as a *tobacco retailer*. The *Chief of Police* shall have authority to grant or deny a *police permit*, and to determine whether to take administrative action against a *police permit* under this Division.
- (b) An investigation for a permit to operate as a *tobacco retailer* shall be conducted as prescribed in Municipal Code sections 33.0302, 33.0303(a), 33.0304, 33.0306, 33.0307, 33.0308, 33.0309, 33.0310, 33.0311, 33.0312, and 33.0313.

§33.4510 Grounds for Denial of Tobacco Retailer Permit

In addition to the grounds for denial stated in Municipal Code section 33.0305(a)-(f), an application for a *police permit* to operate as a *tobacco retailer* shall be denied for any of the following reasons: The applicant has within five years immediately preceding the date of the filing of the application been *convicted* of, suffered any civil penalty, or faced

administrative action against any type of *license* for violations of any tobacco control law, including, but not limited to, the following offenses: Penal Code section 308, Business and Professions Code sections 22950, et seq. (“Stop Tobacco Access to Kids Enforcement Act” or the “STAKE Act”), Business and Professions Code sections 22970, et seq. (“Cigarette and Tobacco Products Licensing Act of 2003”), or a charge of violating a lesser-included or lesser-related offense including, but not limited to, Penal Code section 415, in satisfaction of, or as a substitute for, an original charge of any of the offenses listed in this section.

§33.4511 Right to Appeal Denial of Tobacco Retailer Permit

Any applicant denied a permit to operate as a *tobacco retailer* shall be afforded an appeal as prescribed in Municipal Code sections 33.0501, 33.0502, 33.0503, 33.0504, 33.0505, and 33.0508.

§33.4512 Permit Fees

- (a) All costs associated with administration and enforcement of this Division including, but not limited to, investigating *permit* applications, processing *permit* applications, inspecting, regulating, and enforcing *this Division*, and providing for appeals, shall be borne by applicants and *permittees*. The Mayor shall assess a fee for a *police permit* to operate as a *tobacco retailer* according to the schedule set in the City Clerk’s Composite Rate Book. Fees will be reviewed annually.
- (b) A *permit* issued under this Division shall be valid for a period of one year from the date of issuance.

§33.4513 Tobacco Retailer Operating Requirements

- (a) *A tobacco retailer shall keep and post his or her police permit, issued under this Division, in the manner prescribed in Municipal Code sections 33.0105(a) and (c). This subsection is regulatory only.*
- (b) *Tobacco retailers shall not allow, at any location for which they have a police permit to operate as a tobacco retailer, a violation of any tobacco control law including, but not limited to, the offenses listed in Municipal Code section 33.4510. Tobacco retailers shall be responsible for the acts of others who violate tobacco control laws at any location for which the tobacco retailer possesses a police permit to operate as a tobacco retailer. This subsection is regulatory only.*
- (c) *A tobacco retailer shall display in a conspicuous and prominent location near tobacco products, information, in a manner established by the Chief of Police, on how to report violations of tobacco control laws including, but not limited to, reporting sales of tobacco products to minors, to the Chief of Police.*
- (d) *Clerks who transact tobacco products sales in tobacco retailer establishments shall themselves be the minimum legal age to purchase tobacco products (currently 18 years of age). This subsection is regulatory only.*

- (e) *Tobacco retailers* shall check the age of purchasers of *tobacco products* who reasonably appear to be under the age of 27. This subsection is regulatory only.

§33.4514 Penalties and Regulatory Action

- (a) All penalties and regulatory action related to a *police permit* issued to operate as a *tobacco retailer* shall be conducted as prescribed in Municipal Code sections 33.0401 to 33.0406.
- (b) If a *police permit* issued under this Division is suspended or revoked, the *permittee* shall post, consistent with section 33.4513(a), written notice of such revocation for the duration of the suspension or revocation with their business tax certificate showing a *tobacco retailer endorsement*.
- (c) If a *police permit* issued under this Division is suspended or revoked, all *tobacco products* and tobacco paraphernalia shall be removed from public view for the duration of the suspension or revocation.

§33.4515 Additional Penalties

Pursuant to Health and Safety Code section 11364.7, a business license shall be revoked if a *person* possesses with intent to furnish drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to inject, ingest, inhale, or otherwise introduce into the human body a controlled substance.

§33.4516 Tobacco Retailer Permit Not Transferable

A police permit issued under this Division is not transferable.

§33.4517 Grandfather Clause

Notwithstanding Section 33.4510, *convictions* for offenses listed in Section 33.4510 shall not be used to deny an application for a *police permit* under this Division if the date of the *conviction* was prior to the passage of this Division.

§33.4518 Reporting

The *Chief of Police* shall, on a yearly basis or as requested by the Public Safety and Neighborhood Services Committee, report to the Public Safety and Neighborhood Services Committee the following information:


- (a) A summary of activity related to the administration and enforcement of this Division, including:
 - (1) Number of violations,
 - (2) Number and amount of fines,
 - (3) Number and type of penalties,
 - (4) How the fine revenues are being used, and
 - (5) Detailing the program budget; and
- (b) An accounting of all funds received and used for the administration and enforcement of this Division; and
- (c) The estimated rate of illegal sales of *tobacco products* to minors within the City of San Diego.

Section 2. That a full reading of this ordinance is dispensed with prior to passage, a written copy having been available to the City Council and the public prior to the day of its passage.

Section 3. This ordinance shall take effect and be in force on the one hundred and eightieth day from and after its final passage.

APPROVED: MICHAEL J. AGUIRRE, City Attorney

By



Michael J. Aguirre
City Attorney

LLP
03/23/07
09/11/07 REV.
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